KOAY CHIEW LEONG

v.

UNITED ENGINEERS (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-67-1994]
25 FEBRUARY 1999

LIMITATION: *Pleading - Set-off and Counterclaim - Counterclaim filed some ten years after filing of main claim - Whether time-barred - Limitation period - Whether to run with main cause of action - Whether set-off and counterclaim raised as a matter of pure defence - Section 31 Limitation Act 1953 - Whether s. 31 could be raised where a claim to set-off or counterclaim arose out of same transaction*

CIVIL PROCEDURE: *Pleadings - Striking out - Application to strike out defence of set-off and counterclaim - Whether defence of set-off and counterclaim time-barred - Limitation Act 1953, s. 31*

This case centred on the preliminary issue of whether the defendant's counterclaim, having been filed some ten years after the filing of the main claim by the plaintiff, was time-barred. The facts were that the defendant had sub-contracted two construction projects to the plaintiff by way of two contracts dated 16 June 1981 and 5 August 1981 respectively ('the said projects'). In 1986 the plaintiff claimed against the defendants for monies due under the sub-contracts amounting to RM7,052,897.84. In their defence, the defendant pleaded that there was an overpayment to the plaintiff by RM1,887,144.01, and on that ground prayed for a set-off of the sum. Having prayed for a set-off, however, the defendant had also counterclaimed for the same amount. It was not in dispute that the defendant's defence and counterclaim aforesaid was only filed in 1997 and that being so, the plaintiff contended, by way of his defence to the counterclaim, that the defendant's defence was clearly caught by limitation. The defendant argued, however, that it was saved by the provisions of s. 31 of the Limitation Act 1953. It was also the defendant's contention that since there is no Malaysian statute on set-off, s. 31 could only refer to equitable and not legal set-off.

Held:

[1] If a set-off or counterclaim arises out of the same transaction, as is the case here, it needs to be properly described as a defence and which cannot by any means be caught by the Limitation Act 1953 ('the Act'). This must

be so as the Act does not define "set-off" or a "counterclaim" and refers only to "any claim by way of set-off or counterclaim". With this in view, it is precisely clear that s. 31 of the Act provides that such a set-off or counterclaim will also be deemed to have its limitation period run with the main cause of action so long as such a set-off or counterclaim is raised as a pure defence.

[3] There are statutory provisions relating to set-off as shown by *Sime Diamond leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd*. In any case, whether the set-off is a legal or an equitable set-off, as long as such a set-off relates, *pro tanto*, as a pure defence, then s. 31 of the Act will provide as a protective cover against a plea of limitation. In so far as the counterclaim is concerned, however, the same is caught by limitation.

[Plaintiff's defence of limitation to defendant's counterclaim upheld. Order accordingly.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd v. Sal Enterprise Sdn Bhd & Ors [1994] 3 CLJ 289 ***(aff)***
Henriksens Rederi A/S v. PHZ Rolimpex [1973] 3 All ER 589 ***(aff)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62 ***(not foll)***
Sime Diamond Leasing (M) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 ***(foll)***

Legislation referred to:
Limitation Act 1953, s. 31

Limitation Act 1939 [UK], s. 28

For the plaintiff - M Pathmanathan; M/s Yusuf Khan & Pathmanathan
For the defendant - GH Khoo; M/s Skrine & Co

Reported by Farah Naim & WA Sharif

JUDGMENT

RK Nathan J:

Facts

This suit has a chequered history. It was originally filed in the High Court at Alor Star as Civil Suit No. 23-119-86 and was transferred under the present title to this court on 17 February 1994. However, for reasons not fully nor properly explained, the defence and counterclaim was filed only on 24 January 1997 and a reply and defence to counterclaim filed on 9 June 1998.

The defendant herein was employed by Malayan Four Mills Bhd to undertake the construction and completion of two projects, namely:

(i) The Workshop and Warehouse Works.

(ii) The Feedmill Complex Works.

However, the defendant sub-contracted the said two projects to the plaintiff, by way of two contracts dated 16 June 1981 and 5 August 1981. The plaintiff claims against the defendant for monies due pursuant to these two sub-contracts, including variations and additional works and loss and damage amounting to RM7,052,897.84. The defence is that there has been an overpayment to the plaintiff by RM1,887,144.01 and the defence thus prayed for a set-off of this sum. However, after pleading the set-off, the defence also advances this same amount as a counterclaim against the plaintiff.

Issue Before The Court

By consent, parties agreed that I decide, before the full trial, the plaintiff's defence of limitation to the defendant's counterclaim, as a preliminary issue, for convenience and for saving of time and costs.

Findings Of The Court

For the purposes of determining this issue of limitation, I shall not go into the merits of the defendant's contention of overpayment. It is the plaintiff's case that since the two sub-contracts were signed on 16 August 1981 and 28 December 1982, any claims in respect of these two contracts would have to be made on or before 16 August 1987 and 28 December 1988. Alternatively, it was the plaintiff's case that even if time was to run from the last date that the defendant effected payment to the plaintiff which was on 20 July 1984, the limitation period would have set in on 20 July 1990. Since the defence and counterclaim had only been filed on 24 January 1997 the plaintiff argued, that clearly the defence was caught by limitation.

One factor pertinent to this case is that when the plaintiff commenced this action, the defendant's claim against the plaintiff was not time-barred.

The defendant however argues that it is saved by s. 31 of the Limitation Act 1953 (the Act) which reads:

> 31. For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Section 31 of the Act is in *pari materia* with s. 28 of the English Limitation Act 1939. Mr. Pathmanathan for the plaintiff referred me to *Henriksens Rederi A/S v. PHZ Rolimpex* [1973] 3 All ER 589 CA wherein Lord Denning MR held that s. 28 only applies to a set-off and counterclaim which arise out of transactions that are separate from that of the plaintiff's claim so long as they are not time-barred at the time when the plaintiff issues his writ. I was therefore urged to apply this decision to the case before me and to confine and limit the application of s. 31 to a set-off and counterclaim arising out of separate transactions and to hold inapplicable s. 31 to a set-off and counterclaim arising out of the same transaction as was in this case. The plaintiff argued that whether the counterclaim of the defendant was existing or not when the writ was filed and served, would make no difference to the plea of limitation because at the time of pleading the set-off and counterclaim, time-bar had already set in.

In trying to rationalise the reason why the Master of the Rolls refused to apply s. 28 of the English Act to a claim for set-off or to a counterclaim arising out of the same transaction, Richard Talalla J said in *Bank Bumiputra Malaysia Bhd v. Sal Enterprise Sdn Bhd & 3 Ors* [1994] 3 CLJ 289 at p. 290:

> ... The mischief that s. 31 appears to provide against is a plaintiff trying to steal a march on a defendant by waiting till the last moment to file his claim in Court and upon a defendant then seeking to counterclaim, saying that the defendant is time barred.

However, in this case the mischief rule could never even be considered. Whilst the plaintiff had filed this suit in 1986, the defendant pleaded a set-off and counterclaim in 1997, more than 10 years later.

Having read the decision of the Court of Appeal in *Henriksens* I find that the question before the court and the issue decided was that as a general rule, in an action for the price of goods sold or for remuneration for services rendered, the defendant could rely on a cross-claim in respect of loss of or damage to the goods or improper or inadequate performance of the services as a true defence pro tanto to the plaintiff's claim rather than as a set-off or counterclaim. It therefore followed that such a claim could not be defeated by reliance on any period of limitation. The Court of Appeal further went on to hold that the said general rule, however, had no application to a claim for freight. A claim by a charterer for loss of or damage to cargo could not be relied on as a defence to a claim for freight but had to be the subject of a cross-action. Therefore as the time limit of one year imposed by the charterparty for the charterers' claim had expired, the claim failed.

As to the interpretation given to Lord Denning's views on s. 28 which the plaintiff has held to be the ratio, it is clear to my mind that what was expressed by the Master of the Rolls was mere dicta. Even so his Lordship had made it very clear that whilst he was of the view that s. 28 could not be raised where a claim to set-off or counterclaim arises out of the same transaction, he was quick to add at p. 594:

> ... It can be raised, as I will soon show, as matter of defence, either legal or equitable, so as to reduce or extinguish the claim; and, being matter of defence, it is not subject to a time-bar. Such is the law in the United States, where a cross-claim arising out of the same transaction is described as a right of recoupment. It has been held by the Supreme Court (*Bull v. United States* [1935] 295 US 247 at 262) that:
>
> > recoupment is in the nature of a defence arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defence is never barred by the statute of limitation so long as the main action itself is timely.

It is therefore my judgment that if a set-off or counterclaim arises out of the same transaction it needs to be properly described as a defence and which cannot by any means be caught by the Act. I am fortified in holding this view because the Act does not define "set-off" or a "counterclaim". It merely refers to "any claim by way of set-off or counterclaim". It is precisely with this in view that s. 31 provides that such a set-off or counterclaim will also be deemed to have its limitation period to run with the main cause of action so long as such a set-off or counterclaim is raised as a pure defence.

One other point I have to consider. In *Henriksens* Lord Denning MR took the view that in s. 28 of the English Limitation Act the word "set-off" meant only a set-off permitted by the statutes and that it is not applicable to equitable set-off. Unfortunately for him both the other two Law Lords, namely Cairns LJ and Roskill LJ disagreed with this view and took the view that s. 28 applied to all forms of set-off. Relying on *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 58 FC where Salleh Abas LP said at p. 161:

> We have no statutes dealing with a defence of set-off as are available in the United Kingdom. Neither have the United Kingdom statutes on the subject been incorporated in our Civil Law Act 1956 which deals with the reception of English law in this country. Section 3(1) of this Act only enacts that 'the court shall, in West Malaysia or any part thereof, apply the Common Law of England and the rules of equity as administered in England on the 7th day of April, 1956'. Clearly, equitable set-off is included in the expression 'rules of equity' which the court is required to apply under the section. But the legal set-off which is based on statute is in no way included in the expression 'the Common Law of England' which we are required to apply. Thus, there being no

> Malaysian Statutes comparable to the United Kingdom Statutes on the subject, we therefore hold that only equitable and not legal set-off is part of our law, and consequently the court can only deal with an equitable set-off.

Mr. Khoo for the defence argued that s. 31 therefore must be taken to mean equitable set-off and not legal set-off since there is no Malaysian statutes on set-off. With the greatest of respect the Federal Court in *Permodalan* was not referred to the existing legal and statutory provisions relating to set-off in Malaysia. In a very recent decision in *Sime Diamond Leasing (M) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557 FC Edgar Joseph Jr FCJ said at p. 570:

> Turning from the general to the particular, it is clear law that upon the advent of bankruptcy or liquidation, the rights of contractual set-off, are displaced by statutory provisions relating to set-off on insolvency. The applicable legislation relating to set-off on company Winding-up is to be found in the statutory provisions governing set-off on bankruptcy. To put it another way, the statutory provisions governing bankruptcy set-off are incorporated by reference into the provisions relating to company Winding-up; specifically, ss. 40 and 41 of the Bankruptcy Act, are incorporated by reference to companies by virtue of s. 291(2) of the Companies Act. Section 41 of the Bankruptcy Act is, of course, the section which obliges a creditor who engages in mutual dealings with the company and is also its debtor, to set-off the debts and prove only for the balance. More particularly, s. 41 says this:
>
> > 41.(1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.
> >
> > (2) A person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him.

Clearly therefore there are statutory provisions relating to set-off. In any case, whether the set-off is a legal or an equitable set-off, so long as such a set-off relates, pro tanto, as a pure defence then s. 31 of the Act will provide the protective cover against a plea of limitation. In so far as the counterclaim is concerned it follows therefore that the same is caught by limitation.